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IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

FAIRFAX NURSING HOME, INC.,
Petitioner

v.

UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 7(c) of the Administrative Procedure Act places the burden of proof in administrative proceedings on the "proponent of a rule or order." 5 U.S.C. § 556(d). Under *Hillman Rehabilitation Center v. United States*, DAB No. 1611 (1997), in administrative proceedings where the government seeks to impose sanctions or civil monetary penalties, the "provider bears the ultimate burden of persuasion." The question presented is whether the burden of proof rule in *Hillman* violates section 7(c) of the APA. 5 U.S.C. § 556(d).

PARTIES TO THE PROCEEDING

Petitioner

Fairfax Nursing Home, Incorporated, is a privately-held corporation. It has no parent corporations, and no publicly-held corporation owns 10% or more of Petitioner's stock. Petitioner was the appellant before the Seventh Circuit Court of Appeals.

Respondent

The United States Department of Health and Human Services, the Center for Medicare and Medicaid Services (formerly, Health Care Financing Administration) is the Respondent, and was the appellee before the Seventh Circuit.

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Fairfax Nursing Home Incorporated ("Fairfax") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1 – 13) is reported at 300 F.3d 835. The opinion of the Appeals Board of the Department of Health and Human Services (App. 14 - 43) is available at 2001 HHSDAB LEXIS 112. The decision of the administrative law judge (App. 44 - 80) is available at 2001 HHSDAB LEXIS 42.

JURISDICTION

The Court of Appeals entered its judgment on August 15, 2000. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 7(c) of the Administrative Procedure Act, 5 U.S.C. 556(d) provides:

> Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.

2. 42 U.S.C. 1395i-3(h)(2)(B)(ii) of the Medicare Act incorporates section 1320a-7a(c)(2) of the Social Security Act to govern CMP hearings against skilled nursing facilities. 42 U.S.C. 1395i-3(h)(2)(B)(ii) provides:

> (B) Specified remedies
>
> The Secretary may take the following actions with respect to a finding that a facility has not met an applicable requirement:
>
> (i) Denial of payment
>
> * * *
>
> (ii) Authority with respect to civil money penalties
>
> The Secretary may impose a civil money penalty in an amount not to exceed $10,000 for each day of noncompliance. The provisions of section 1320a-7a of this title (other than subsections (a) and (b)) shall apply to a civil money penalty under the previous sentence in the same manner as such provisions apply to a penalty or proceeding under section 1320a-7a(a) of this title.

3. 42 U.S.C. 1320a-7a(c)(1) and (2), titled "Civil monetary penalties" provide in pertinent part:

> (c) Initiation of proceeding; authorization by Attorney General, notice, etc., estoppel, failure to comply with order or procedure
>
> (1) The Secretary may initiate a proceeding to determine whether to impose a civil money penalty, assessment, or exclusion unde subsection (a) or (b) of this section

only as authorized by the Attorney General pursuant to procedures agreed upon by them. . . .

(2) The Secretary shall not make a determination adverse to any person under subsection (a) or (b) of this section until the person has been given written notice and an opportunity for the determination to be made on the record after a hearing at which the person is entitled to be represented by counsel, to present witnesses, and to cross-examine witnesses against the person.

4. 42 CFR § 483.25, the Department of Health and Human Services regulation implementing the Social Security Act, 42 U.S.C. 1395i-3 and 42 U.S.C. 1396r *et seq.*, pursuant to which the deficiencies below were cited provides in pertinent part as follows:

Each resident must receive and the facility must provide the necessary care and services to attain or maintain the highest practicable physical, mental and psychosocial well-being, in accordance with the comprehensive assessment and plan of care.

...

(k) *Special needs.* The facility must ensure that residents receive proper treatment and care for the following special services:

(1) Injections;

(2) Parenteral and enteral fluids;

(3) Colostomy, ureterostomy, or ileostomy care;

(4) Tracheostomy care;

(5) Tracheal suctioning;

(6) Respiratory care;

(7) Foot care; and

(8) Prosthesis.

STATEMENT OF THE CASE

Petitioner, Fairfax Nursing Home, Inc. ("Fairfax") is a skilled nursing facility participating in Medicare and Medicaid. The Center for Medicare and Medicaid Services ("CMS" formerly Healthcare Financing Administration) assessed a civil monetary penalty ("CMP") against Fairfax of approximately $320,000 for failing to comply with Medicare regulations governing the care of respirator-dependent nursing home residents. Fairfax requested a hearing before an administrative law judge. The ALJ upheld the CMP in an opinion dated March 22, 2001. *Fairfax Nursing Home, Inc. v. Health Care Financing Administration*, DAB CR 1, 2001 HHSDAB LEXIS 42 (2001) (App. 44 – 80). Fairfax sought further review, and the Appellate Division of the Departmental Appeals Board rendered a decision on October 30, 2001, affirming the ALJ's decision. *Fairfax Nursing Home, Inc. v. Health Care Financing Administration*, DAB No. 1794; 2001 HHSDAB LEXIS 112 (2001) (App. 14 – 43). Fairfax appealed to the United States Court of Appeals for the Seventh Circuit, and it affirmed in a decision dated August 15, 2002, reported at 300 F.3d 835 (App. 1 - 13). Fairfax's principle contentions on appeal were that the ALJ erroneously placed the burden of proof on Fairfax and that the ALJ applied an incorrect legal standard in determining that Fairfax had violated applicable regulations.

Facts

Based on a recommendation by surveyors from the Illinois Department of Public Health, CMS determined that Fairfax violated regulations relating to care of ventilator dependent residents from December 20, 1996 through April 8, 1997. CMS alleged that Fairfax's residents were in a state of "immediate jeopardy" -- the most severe category

of violation -- for 105 days, resulting in a CMP of approximately $320,000.

The first alleged deficiency occurred on December 20, 1996 when a resident, "R10,"[1] went into respiratory distress and was treated by respiratory therapists. One therapist turned off R10's ventilator because the alarm was sounding. Once R10 was stabilized, the therapists left, but neglected to turn the ventilator back on. As a result, R10 died. Fairfax had a policy to never turn off ventilators, even when residents were taking a shower. Tr. 485, 537.[2] The day after the incident, the therapist who turned off the respirator resigned. In the days that followed, Fairfax held in-service training sessions for its staff and discussed ventilator-dependent patient care and the importance of not turning off ventilators.

Fairfax notified the Illinois Department of Public Health ("IDPH") of the incident regarding R10, and IDPH sent a surveyor to investigate on January 2, 1997. She reviewed records regarding R10 and the subsequent in-service training. Although the surveyor did not leave anything in writing, before leaving the facility she told a Fairfax employee "that there were no findings and that it was human error." Tr. 490 If the surveyor had determined that a state of immediate jeopardy existed, she had to take "immediate action to remove the jeopardy and correct the non-compliance through temporary management" or

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[1] Residents are denoted by number to respect their privacy.

[2] References to "Tr." are to the transcript included with the record on appeal at Appendix B. References to "Pet. Ex__" are to Petitioner's exhibits included in the record on appeal at Appendix A. References to "S. App. __" are to Petitioner's separate appendix to its briefs before the Seventh Circuit.

terminate Fairfax's provider agreement. 42 CFR 488.410. She did neither.

Later in January 1997, Fairfax hired a new Director of Respiratory Care and Fairfax developed -- without any prodding from IDPH or CMS -- a new written policy for monitoring ventilator-dependent residents in respiratory distress. Pet. Ex. 10. The policy was written during February of 1997 and implemented in early March 1997. Tr. 492.

From December 23, 1996 through February 1997, there were no deficiencies cited, nor has there ever been a repeated incident when a ventilator was turned off. On April 8, 1997, IDPH completed an annual survey and Fairfax then learned it was being cited for deficiencies in March and early April, 2002.

Fairfax was cited for a deficiency on March 2, 1997 regarding R126, who was admitted on February 28, 1997 as a "do not resuscitate" (DNR) patient. His doctor testified that R126's brain was "in a severely degenerative condition" and that he could not recover. Tr. 28, 35. Upon admission, brown secretions were found near R126's trach site indicating a likely infection. Tr. 332-333. R126 had fixed pupils and was unresponsive to pain. Tr. 28. R126 died on March 2, 1997, two days after admission. Fairfax was cited because nursing notes did not show that orders the doctor gave were carried out, and the notes did not indicate complete and follow-up assessments pursuant to Fairfax's new guidelines. At trial, the attending nurses testified that they did carry out the doctor's orders even though they did not chart their actions. Tr. 340-44. R126 died within hours after the doctors orders were given. Several of the procedures that the doctor ordered would have taken 24 hours to several days to have any effect. Tr. 32-33, 47, 341.

Fairfax was cited for care given to R127, another DNR patient. R127 had been a heavy smoker, she had chronic obstructive pulmonary disease, and she was in the end stage of that terminal disease. Tr. 64-65. The resident's family did not wish to prolong her life. Tr. 66. They told the treating physician to provide only "comfort care," which he testified meant: "Keep the patient comfortable and let her die, as requested by the family." Tr. 69, 72. On March 25, 1997, two days before she died, R127 was found to have a severe infection. App. 12. The doctor knew about the infection but he prescribed nothing because of the DNR status. Tr. 71. IDPH surveyors cited a deficiency regarding R127 because there was insufficient documentation showing complete assessments under Fairfax's new guidelines on certain days earlier in March. Pet. Ex. 1, p. 5 (noting episodes on 3/5, 3/7, 3/10, and 3/21/97 when vital signs and follow-up assessments were not charted). The ALJ found that Fairfax failed to monitor R127 frequently enough during and after episodes of respiratory distress on 3/5, 3/7, and 3/21. App. 15. Nevertheless, the surveyor admitted on cross-examination that R127 responded well to the treatments given on 3/5, 3/7 and 3/21. Tr. 244-47, 252. Thus, Fairfax was cited for deficiencies where treatments and care were given with good results, but documentation regarding monitoring was allegedly deficient.

Surveyors cited Fairfax for care given R83. The Seventh Circuit's opinion misstates the facts regarding R83. The opinion says that after R83 was found non-responsive, R83 was treated and "[t]he first noted follow-up was an hour later and 2-1/2 hours passed before R83 was monitored again." App. 4. That is inaccurate. On March 23, 1997 at 8:15am, R83 was observed to be lethargic and non-responsive to verbal stimuli. Pet. Ex. 15, p.2. R83 was treated, and the doctor was called and gave further

instructions. At 9:15am, the respiratory therapist documented that R83's oxygen level was at 93%. Pet. Ex. p. 4. At 9:30am, the nurse noted that she started an IV, and noted that oxygen level was at 90-92%. Pet. Ex. 15, p. 2. At 10:00, the respiratory therapist charted that SAO2 level was 94% with oxygen concentration at 40%. Pet. Ex. 15, p. 4. At 11:00am, the respiratory therapist charted R83 with a SAO2 level of 93%. *Id.* At 12:00noon, the nurse again noted R83's SAO2 at 90-92% with no distress noted. Fairfax *successfully* treated this resident, but Fairfax was cited because it should have charted more frequently. *See* App. 68.

Fairfax received a citation involving R68's treatment on April 3, 1997. Pet. Ex. 1, p. 7. Nurse progress notes indicate that at 8:15pm, R68 became cyanotic with an SAO2 of 75% requiring ambu-bagging and an increase of FIO2 (fraction of inspired oxygen) on the ventilator to 40%. Pet. Ex. 12, p.3. R68 responded well to the initial intervention, and thereafter at 15 minute intervals throughout the next hour the nurse documented the oxygen saturation level, skin color, and unlabored breathing. Pet. Ex. 12, p. 3-4. Nevertheless, the ALJ below said that the assessments omitted some vital sign information and other required evaluation data. App. 68 - 69. The Seventh Circuit's opinion states that "[o]n April 4, R68 was not sufficiently stable to permit a routine tracheostomy change." App. 5. However, the ALJ below stated that "the inability to perform routine tracheostomy care on R68 on April 4, 1997, is not indicative of a deficiency on the part of [Fairfax]." App. 69. There is no dispute that R68 received care and responded well to the treatment given.

The final citation against Fairfax was for tracheotomy care that one of the nurses provided for two residents, R6 and R11, on April 2, 1997. Pet. Ex. 1, p.8.

The deficiency involved alleged failures to hyper-oxygenate the residents before suctioning, and failing to use sterile procedures. However, CMS introduced no testimony or evidence that R6 and R11 contracted any disease or infection as a result of the care given. Tr. 309.

On April 8, 1997, the IDPH surveyors completed their survey and determined that Fairfax was not in compliance with the federal requirements for nursing homes participating in Medicare and Medicaid, and that Fairfax's actions and omissions posed "immediate jeopardy" to the health and safety of its residents. App. 5. CMS concurred in IDPH's decision, and by letter dated May 7, 1997 CMS imposed a CMP of $3,050 per day for a 105-day period from December 20, 1996 through April 3, 1997 of approximately $320,000.

Decision by the ALJ

Fairfax requested and received a hearing before an ALJ. The ALJ placed the burden of proof on Fairfax to "overcome" CMS's case "by a preponderance of the evidence," citing to an earlier administrative decision called *Hillman Rehabilitation Center v. Health Care Financing Administration*, DAB No. 1611 (1997) *aff'd Hillman Rehabilitation Center v. United States*, No. 98-3789(GEB) (D. N. J. May 13, 1999). App. 6. According to *Hillman*:

> The provider bears the ultimate burden of persuasion. To prevail, the provider must prove by a preponderance of the evidence on the record as a whole that it is in substantial compliance with the relevant statutory and regulatory provisions.

App. 21 (quoting *Hillman*).

After the hearing, the ALJ found that "from December 20, 1996 through April 3, 1997, Petitioner was not in substantial compliance at the immediate jeopardy

level." *See* Finding 1 at App. 50. He made findings that Fairfax: (1a.) failed to implement a policy concerning ventilator dependent residents, and that this brought about the premature demise of R10; (1b.) failed to carry out the treating physician's orders and failed to properly document R126's medical charts; (1c) failed to adhere to the guidelines it had developed in February 1997, and implemented at the beginning of March 1997 by not monitoring and providing follow-up assessments to R127; (1d) failed to adhere to the guidelines by not monitoring or providing proper follow-up assessments to R83 and R68; and (1e) failed to adhere to ensure that R6 and R11 received proper tracheostomy care. For each of his findings 1b. - 1e, the ALJ stated "This had the *potential* for serious injury, harm, impairment, or death to the resident[s] and constitutes immediate jeopardy." *See* App. 54, 59, 66, 69 (emphasis added). Fairfax asserts that by equating mere "potential" for harm with immediate jeopardy, the ALJ applied an incorrect legal standard because "potential" corresponds to lower level deficiencies.

The ALJ also found that "[b]eginning December 20, 1996 and continuing through April 3, 1997, Petitioner failed to comply with the requirements of 42 C.F.R. 483.25 at the immediate jeopardy level." App. 73 (Finding 2.) The ALJ based his ruling on Fairfax' failure meet its burden to prove compliance. The ALJ declared:

> First, [CMS] established a prima facie case, which Petitioner did not rebut, that as of December 20, 1996, Petitioner was not complying substantially with the participation requirement at 42 C.F.R. 483.25. Indeed, there is not only a prima facie case of noncompliance here, but the preponderance of the evidence is that Petition was not complying substantially with this requirement. . . . Third, *Petitioner did not prove by the preponderance of*

> *the evidence that it had eliminated the immediate jeopardy to its residents on any date prior to April 4, 1997.*

App. 79 (emphasis added). The ALJ also found that the amount of the penalty imposed by HCFA is reasonable. App. 79.

Fairfax appealed. Fairfax asserted that the ALJ erred, among other ways, by following *Hillman* and placing the burden of proof on Fairfax. Fairfax also asserted that the ALJ erred in employing the wrong legal standard in concluding that the cited deficiencies were at the immediate jeopardy level, and concluding that a continuous 105-day state of immediate jeopardy existed.

Decision of the Departmental Appeals Board

The Appellate Division of the Departmental Appeals Board affirmed. App. 43. The Appellate Division found that the ALJ applied the appropriate burden of proof by following *Hillman*. App. 20 The panel also concluded that the ALJ did not err in determining the duration of the penalty, concluding that it is "irrelevant" that HCFA did not find any deficient care during the first 70 days after R10's death. App. 34.

Seventh Circuit's Decision

The Seventh Circuit found that Fairfax's *Hillman* challenge had not been waived. (A. 8, n. 4). Nevertheless, the Seventh Circuit declined to rule on Fairfax's *Hillman* challenge. The Seventh Circuit reasoned that "the issue does not affect the outcome in this case" because "*Hillman* is operative only when the evidence is in equipoise." App. 8, n.4. Even so, the Seventh Circuit acknowledged the importance of the issue, stating:

> [W]e believe that this issue [i.e., burden of proof in CMP hearings] ought to be addressed *with great prudence and caution*. The Appellate Division has not addressed the application of this rule to civil monetary penalties in any comprehensive manner. . . . Premature adjudication on our part will not be helpful in achieving accuracy or clarity in *this important area of administrative practice.* Definitive adjudication on our part is best reached after that administrative body has had the opportunity to set forth in more plenary fashion than it has in this case the justification for this rule.

App. 8, n. 4 (emphasis added). The Seventh Circuit concluded that the Board's decision was supported by substantial evidence and, therefore, affirmed.

For the reasons explained more fully below, the Seventh Circuit erred in refusing to address the *Hillman* issue. It would be appropriate for this Court to vacate and remand for the Seventh Circuit to address the issue, if this Court declines to hear it.

REASONS FOR GRANTING THE PETITION

This Court should exercise its supervisory power to correct a lower court's "departure from the accepted and usual course of judicial proceedings." S. Ct. R. 10(a). The Seventh Circuit allowed an administrative court's decision to stand that conflicts with section 7(c) of the APA, and conflicts with the majority of analogous administrative statutes and regulations. It also conflicts with this Court's decision in *Director, Office of Workers' Comp. Programs, DOL v. Greenwich Collieries*, 512 U.S. 267 (1994).

I. The administrative agencies are divided as to which party has the burden of proof in civil penalty proceedings.

Because of *Hillman*, there is a split of authority among administrative agencies regarding which party has the burden of proof in hearings in which the government seeks to impose fines or civil monetary penalties. CMS' *Hillman* rule directly conflicts with the majority of analogous administrative statutes and regulations; the majority rule is that the government has the burden of proof when it seeks to impose fines and penalties. Agencies that have the burden of proof when imposing fines or civil penalties, include the following:

Federal Maritime Commission. Section 13(c) of the Shipping Act of 1984, 46 U.S.C. app. 1712(c), allows the Maritime Commission to assess civil penalties for violations of the Shipping Act. In *Merritt v United States*, 960 F.2d 15 (7th Cir. 1992), the Seventh Circuit held that under both the Shipping Act and the APA, 5 U.S.C. 556(d), the Commission had the burden of coming forward with evidence to support its $395,000 fine. *Id.* 960 F.2d 18. The Commission in *Merritt* failed to make specific findings on the respondent's ability to pay, as the Shipping Act requires. The Seventh Circuit therefore vacated the fine and remanded for further proceedings.

Department of Agriculture. The Packers and Stockyards Act, 7 U.S.C. 213(b) (1982), allows the Secretary of the Department of Agriculture to assess a $10,000 civil money penalty for a deceptive practice in connection with selling livestock on a commission. In *Bosma v. United States Dept. of Agriculture,* 754 F.2d 804 (9th Cir. 1984), the Ninth Circuit held that the department, as proponent of a $10,000 CMP, had the burden of proof to come forward with evidence that the penalty was

reasonable. Because the department failed to produce such evidence, the Ninth Circuit vacated the penalty. *Id.*, at 810.

Internal Revenue Service. The IRS has the authority to impose civil penalties on persons who understate tax liabilities. 26 U.S.C. 6701. The relevant statute states that "[i]n any proceeding involving the issue of whether or not any person is liable for a penalty under section 6700, 6701, or 6702, the burden of proof with respect to such issue shall be on the Secretary." 26 U.S.C. 6703(a). *Barr v. United States*, 67 F.3d 469 (2d Cir. 1995) (IRS has burden to prove tax penalties under I.R.C. 6700, 6701 by preponderance of the evidence); *Bothke v. United States*, 670 F. Supp. 285, 289 (C.D. Cal. 1987) (burden of proof regarding liability for frivolous tax return penalty rests on government).

Department of Health and Human Services. The Office of the Inspector General within the Department of Health and Human Services has authority to impose civil money penalties under Medicare or state health care programs. 42 U.S.C. 1320a-7a(a). Implementing regulations for section 1320a-7a provide that in administrative hearings "(1) The respondent or petitioner, as applicable, bears the burden of going forward and the burden of persuasion with respect to affirmative defenses and any mitigating circumstances; and (2) The IG bears the burden of going forward and the burden of persuasion with respect to *all other issues*." 42 CFR 1005.15 (emphasis added).

CMS may impose civil penalties under 42 U.S.C. 300gg of up to $100/day for violations of the requirements for participating in group health insurance plans. *See* 42 CFR 150.315; 45 CFR 150.343. In such hearings, CMS has the burden of persuasion regarding facts material to the assessment, while the respondent has the burden of

persuasion regarding affirmative defenses. 45 CFR 150.443.[3]

Social Security Administration. The Inspector General within the Social Security Administration may assess civil monetary penalties against persons who make false statements in determining any right to or amount of benefits. *See* 20 CFR 498.100. In such hearings, the "(1) The respondent has the burden of going forward and the burden of persuasion with respect to affirmative defenses and any mitigating circumstances; and (2) The Inspector General has the burden of going forward and the burden of persuasion with respect to *all other issues*." 20 CFR 498.215 (emphasis added).

Department of Education. When the Department of Education seeks to impose a fine or to terminate an educational institution's participation in federal financial aid programs, the pertinent regulations provide that the "designated Department official has the burden of persuasion in any fine, suspension, limitation or termination proceeding under this subpart." 34 CFR 668.88. *See also* 34 CFR 86.409 (same); 34 CFR 85.201 (institutions and lenders may be debarred if they receive notice and a hearing at "which the agency bears the burden of persuasion, by a preponderance of the evidence").

Department of Energy. Participants in Department of Energy nuclear activities may be subject to civil

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[3] "(1) CMS has the burden of coming forward with evidence sufficient to establish a prima facie case; (2) The respondent has the burden of coming forward with evidence in response, once CMS has established a prima facie case; and (3) CMS has the burden of persuasion regarding facts material to the assessment; and (4) The respondent has the burden of persuasion regarding facts relating to an affirmative defense." 45 CFR 150.443.

monetary penalties of up to $110,000 for each violation of safety requirements. 10 CFR 820.81. In such hearings, "[t]he Director has the burden of going forward with and of proving that the violation occurred . . . and that the proposed civil penalty is appropriate. Following establishment of a prima facie case, respondent shall have the burden of presenting and going forward with any defense . . . ." 10 CFR 820.29.

National Science Foundation. The Director of the National Science Foundation may assess civil penalties against violators of the environmental protection provisions of the Antarctic Conservation Act of 1978, 16 U.S.C. 2401. Fines range from $12,000 for unintentional violations, to $25,000 for intentional violations. At such hearings, the "complainant has the burden of going forward with and of proving that the violation occurred . . . and that the proposed civil penalty, [or] revocation, . . . is appropriate. Following the establishment of a prima facie case, respondent has the burden of presenting and of going forward with any defense ...." 45 CFR 672.17.

Federal Deposit Insurance Corporation. Violators of the law relating to the Federal Deposit Insurance Program are subject to a civil penalty of up to $1 million per violation or $5 million for continuing violations. 12 U.S.C. 1833a(b). The statute provides that "[i]n a civil action to recover a civil penalty under this section, the Attorney General must establish the right to recovery by a preponderance of the evidence." 12 U.S.C. 1833a(e).

By contrast, at least one administrative agency has regulations that place the ultimate burden of persuasion on the penalized party for certain issues, similar to the *Hillman* rule.

Department of Interior. Under 30 U.S.C. 1268, the Department of Interior may impose a fine of up to $10,000

for willful violations or knowingly false statements relating to surface coal mining operations. In such proceedings, the Office of Surface Mining Reclamation and Enforcement "shall have the burden of going forward to establish a prima facie case as to the fact of the violation and the amount of the civil penalty and the ultimate burden of persuasion as to the amount of the civil penalty. The person who petitioned for review shall have the *ultimate burden of persuasion as to the fact of the violation*." 43 CFR 4.1155 (emphasis added).

The split of authority among the agencies regarding the burden of proof in CMP proceedings should be addressed. When Congress enacted the Administrative Procedure Act, one of the "evils sought to be cured or minimized" was the lack of "uniformity of procedure and standardization of administrative practice among the diverse agencies whose customs had departed widely from each other." *Wong Yang Sung v. McGrath*, 339 U.S. 33, 41 (1950) (citing legislative history). The overwhelming majority of agencies have statutes or regulations that place the ultimate burden of persuasion on the agency. The *Hillman* rule is an irreconcilable exception. Agencies like CMS should not be allowed to make rules that shift the burden of proof away from themselves so that it is easier for them to impose CMPs than for other agencies.

A. The *Hillman* decision is erroneous and should be overturned.

In *Hillman Rehabilitation Center*, DAB No. 1611 (1997) (App. 81 – 152) *available at* 1997 HHSDAB LEXIS 547 (1997), *aff'd Hillman Rehabilitation Center v. United States*, No. 98-3789 (GEB) (D. N. J. May 13, 1999), CMS decided that the nursing facility's participation in Medicare should be terminated for failing to comply with federal requirements for outpatient physical therapy and

rehabilitation. App. 82. The ALJ held that CMS had the ultimate burden of persuasion, and after an administrative hearing, concluded that CMS failed to meet its burden. The ALJ said that since CMS has obtained the evidence that it believes justifies termination, CMS should be put to the test of proving that its determination is supported by a preponderance of the evidence. App. 86. Even though *Hillman* did not involve a CMP, the ALJ analogized the case to "civil money penalty cases brought by the Inspector General in which the government bears the burden of proof." App. 100 - 101.

On appeal, the Departmental Appeals Board reversed. The Appeals Board agreed with the CMS's argument that it is inconsistent with the statutory goal of protecting nursing home residents--the intended beneficiaries of Medicare-- to place the ultimate burden of persuasion on the Department. App. 93. The Appeals Board declared that the "statute and regulations, read as a whole, compel the conclusion that the ultimate burden of persuasion must rest on the provider." App. 94.

The Appeals Board in *Hillman* also decided that civil monetary penalty cases were not analogous, as the ALJ below had concluded. App. 101. However, in a subsequent case, *Cross Creek Health Care Center v. HCFA,* DAB No. 1665 (1998), *available at* 1998 WL 479291, the Appeals Board extended the *Hillman* rule to civil monetary penalty cases like this one. App. 8.

1. *Hillman* violates the APA.

The burden of proof ruling in *Hillman* is erroneous and should be overturned. Section 7(c) of the APA states that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C.A. § 556(d). There is no applicable statute that "provides otherwise." CMS, therefore, must have the

burden of proof because it is the proponent of the rule, 42 C.F.R. § 483.25(k), under which Fairfax was penalized. Under that regulation, CMS is imposing a civil monetary penalty of over $320,000. Thus, CMS is the proponent of both the "rule" and the "order" imposing the CMP. At least two Circuit Courts -- including the Seventh Circuit itself -- have held that where the government seeks to impose a fine or sanction, it is the "proponent of the rule." *Merritt v. United States*, 960 F.2d 15, 18 (7th Cir. 1992) (commission was the proponent of the order imposing fines against petitioner and under APA had the burden of going forward with the evidence); *Bosma v. United States Department of Department of Agriculture*, 754 F.2d 804, 801 (9th Cir. 1984) (department was the proponent of the order assessing $10,000 penalty and therefore under APA had the burden to prove penalty was reasonable).

Two decisions from this Court relating to section 7(c) also undermine *Hillman*. In *Director, Office of* Workers' *Comp. Programs, DOL v. Greenwich Collieries*, 512 U.S. 267, 281 (1994), this Court invalidated a burden-shifting administrative rule under section 7(c) that is similar to *Hillman*. In *Greenwich*, this Court considered the Department of Labor's "true doubt rule" which essentially shifted the burden of persuasion to the party opposing the benefits claim. *Id.*, 512 U.S. at 269. This Court stated that the phrase "burden of proof" in section 7(c) means burden of *persuasion*, not just the burden of *production*. *Id.*, at 277-78. This Court found that the Department's true doubt rule conflicted with section 7(c) and the APA's goal of introducing greater uniformity among the agencies. This Court rejected the "Department's reading [under which] each agency would be free to decide who shall bear the burden of persuasion." *Id.*, at 281. This Court declared that the Department cannot allocate the burden of persuasion in a manner that conflicts with the APA.

In *Greenwich*, this Court relied on its decision in *Steadman v. SEC*, 450 U.S. 91, 102 (1981). *Greenwich*, 512 U.S. at 277. In *Steadman*, this Court held that APA section 7(c) requires the proponent of the rule or order to meet the preponderance of the evidence standard of proof. This Court held that SEC had to meet preponderance of evidence standard regarding sanctions against a broker for securities violations, but did not require the SEC to prove its case by clear and convincing evidence.

The same analysis applies here. As the proponent of both the regulation and the civil monetary penalty, CMS had the burden of persuasion to prove noncompliance by the preponderance of the evidence. The *Hillman* rule clearly conflicts with APA section 7(c). It is also contrary to the usual burden imposed on plaintiffs.[4] The Seventh Circuit should have followed *Greenwich* and *Steadman* as controlling, and overturned *Hillman*. If this Court declines to take this case, it would be appropriate under the circumstances for this Court to exercise its GVR power and require the Seventh Circuit to address *Hillman* in light of *Greenwich* and *Steadman*.

2. The Seventh Circuit erred in failing to consider *Hillman*.

The Seventh Circuit declined to consider *Hillman*, even though the issue had been thoroughly briefed and had been addressed on the merits by the Appeals Board below.

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[4] In seeking to impose a $320,000 civil penalty, CMS is essentially in the posture of a plaintiff. "[B]ecause the plaintiff 'seeks to change the present state of affairs,' he 'naturally should be expected to bear the risk of failure of proof or persuasion.'" *O'Neal v. McAninch*, 513 U.S. 432 (1995) (Thomas, J. dissenting) (quoting 2 McCormick on Evidence 337, at 428 (J. Strong, 4th ed. 1992)).

The Seventh Circuit stated in that "the issue does not affect the outcome in this case" because "*Hillman* is operative only when the evidence is in equipoise." A 8, n.4.

That is incorrect. *Hillman* was operative from the outset of the case. The ALJ below issued a pre-hearing order stating that the "burden of persuasion shall be allocated as in *Hillman Rehabilitation Center*, DAB No. 1611 (1997)." R. 75-76. Moreover, the ALJ's opinion plainly showed his reliance on *Hillman* for his finding of 105 days of "immediate jeopardy." The ALJ stated that "Petitioner [Fairfax] did not prove by the preponderance of the evidence that it had eliminated the immediate jeopardy to its residents on any date prior to April 4, 1997." App. 79. Thus, *Hillman* was "operative" throughout the hearing as far the ALJ was concerned. The *Hillman* rule was just as "operative" as the burden of proof regulations and statutes referenced in the preceding section.

The error regarding the burden of proof could have easily affected the outcome here. For an unbroken span of over two months after the accident regarding R10, there were no cited deficiencies whatsoever. The ALJ got around this hole in the record by placing the burden on Fairfax to prove that it had eliminated the immediate jeopardy after the accident regarding R10. App. 79 ("Petitioner did not prove by a preponderance of the evidence that it had eliminated the immediate jeopardy to its residents on any date prior to April 4, 1997.") Moreover, in a parallel state proceeding, where the State had the burden of proof, the result was different. In February 1998, a hearing was held before the Illinois Department of Public Health, involving the same April 1997 survey and many of the same witnesses and evidence. In that proceeding, the ALJ concluded that the State failed to prove that the state-law equivalent of immediate jeopardy existed at the facility. *See* S. App. 23-24. In the

state administrative process, the burden of proof rests with the government. S. App. 39 (Department did not prove certain violations by the preponderance of the evidence). Thus, in a parallel proceeding involving the same survey and much of the same evidence, and where the State had the burden of proof, the result was different.

Rules that place the ultimate burden of proof on the wrong party can affect the outcome in many cases. In criminal cases, of course, the prosecution must prove guilt beyond a reasonable doubt. If the burden were shifted to the defendant to prove innocence by the preponderance of the evidence, there would certainly be more convictions. *In re Winship*, 397 U.S. 358 (1970) (adjudication that 12-year old boy was delinquent for stealing pocket book is reversed because he was convicted under preponderance standard; *held*: guilt must be proved "beyond a reasonable doubt.") *Hillman's* rule that the facility must prove compliance to avoid a CMP is analogous to requiring the criminal defendant to prove innocence. The Seventh Circuit should have recognized the probable impact of *Hillman* in this case, and should have given Fairfax a new hearing under a correct standard.

In declining to address *Hillman*, the Seventh Circuit suggested that the "Appellate Division has not addressed the application of this rule to civil monetary penalties in any comprehensive manner." App. 8, n. 4. The Seventh Circuit said it wanted to give the Appellate Division an "opportunity to set forth in more plenary fashion than it has in this case the justification for this rule." *Id.* However, the Appellate Division has had numerous opportunities to explain itself since *Hillman* came down in 1997. The Appellate Division has repeatedly reaffirmed *Hillman* in dozens of cases, including many CMP cases. A recent search of the database of DAB decisions on LEXIS for cases citing *Hillman* yielded 102 cases. Of those 102 cases,

62 involved civil monetary penalties.[5] Thus, *Hillman* is settled law in the Appellate Division's view. The Seventh Circuit erred in refusing to address *Hillman*.

3. The Question Presented Is Important.

The Seventh Circuit conceded the importance of the question here: "[W]e believe that this issue [i.e., burden of proof in CMP hearings] ought to be addressed *with great prudence and caution*. . . Premature adjudication on our part will not be helpful in achieving accuracy or clarity in *this important area of administrative practice*." App. 8, n. 4 (emphasis added). Meanwhile, the Appeals Board's *Hillman* rule is being widely followed.

Congress thought that the rules dictating which party has the burden of proof are so important that it did not let the administrative agencies themselves make the rules. Section 7(c) declares that the proponent of a rule or order has the burden of proof "[e]xcept as otherwise provided by statute." 5 U.S.C. 556(d). Thus, the burden of proof can be shifted away from the proponent of a rule only by Congress through a "statute." Congress has not done that here.

One of the principle goals of the APA was to establish uniformity and standardization among the agencies. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 41 (1950). The *Hillman* rule differs from most other agencies' rules and, therefore, is one of the "evils [the APA] was aimed at." *Id.* As shown in section I, almost all agencies that have authority to issue CMPs follow section 7(c) and place the ultimate burden of proof on the "proponent" of

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[5] Search performed on 10/30/02 on LEXIS in Library: Health; File: HHSDAB; Search: "Hillman Rehab! and date aft 2/28/97" yielded 102 cases. Focus search in those 102 cases for "civil /5 penalty!" yielded 62 cases.

the CMP. Agencies like CMS simply cannot be permitted to shift the burden of proof away from themselves in hearings where they seek to impose fines and penalties. This contravenes both the spirit and the letter of the Administrative Procedure Act. As this Court said in *Wong Yang Sung*, "it would be a disservice to our form of government and to the administrative process itself if the courts should fail, so far as the terms of the [APA] warrant, to give effect to its remedial purposes where the evils it was aimed at appear." 339 U.S. at 41.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted. In the alternative, this Court should vacate the Seventh Circuit's opinion and remand for the Seventh Circuit to address Fairfax's APA challenge in light of *Director, Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267 (1994).

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Respectfully submitted,

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